No. 89-1029

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

Petitioner,

v.

NORTHERN NATURAL GAS CO. AND
ENRON LIQUIDS PIPELINE CO.,

Respondents.

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

Petitioner,

v.

TRAILBLAZER PIPELINE COMPANY,

Respondent.

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

Petitioner,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA,

Respondent.

BRIEF OF RESPONDENTS (NORTHERN) IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

NORMAN H. WRIGHT #15789
Counsel of Record
JOHN K. BOYER #10396
AMY S. BONES #17253
FRASER, STRYKER, VAUGHN, MEUSEY,
OLSON, BOYER & BLOCH, P.C.
500 Energy Plaza
409 South 17th Street
Omaha, NE 68102
(402) 341-6000
Counsel for Respondents
Northern Natural Gas Co. and
Enron Liquids Pipeline Co.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

Petitioner asserts that two questions are presented for review, each arising from an application of the equal protection clause to afford similarly situated property taxpayers equalization with rail transportation property granted relief under 49 U.S.C. § 11503.

PARTIES

Respondents accept Petitioner's list of parties in the Petition for Writ of Certiorari.[1]

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[1] In compliance with Rule 29.1 of the Supreme Court of the United States, Northern Natural Gas Co. (hereinafter "Northern") submits the following listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Northern: Enron Corp. (parent), Enron Liquids Pipeline Co. (affiliate), Amnorth, Inc. (affiliate), Belco Petroleum Corporation (subsidiary), Coal Properties Corporation (subsidiary), Comanche Marketing, Inc. (subsidiary), Cora Dock Corporation (affiliate), Enron/Dominion Cogen Corp. (affiliate), Enron Holdings, Inc. (affiliate), Enron Mojave, Inc. (affiliate), Enron Overthrust Pipeline Company (affiliate), Enron Texoma Gas Company (affiliate), Enron Trailblazer Pipeline Company (affiliate), Houston Pipe Line Company (subsidiary), In Holdings, Inc. (subsidiary), Intratex Gas Company (subsidiary), Northern Border Pipeline Company (affiliate), Northern Plains Natural Gas Group, Inc. (affiliate), Transgulf Pipeline Company (affiliate), Webster Transportation Company, Inc. (subsidiary).

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OPINIONS BELOW

Respondent accepts and incorporates by reference the opinions cited in Petitioner's Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

For the reasons stated in its Argument which follows, Northern asserts that this Court lacks jurisdiction to grant Petitioner's request for Writ because there is a clearly stated, independent and adequate basis for the decision of the Nebraska Supreme Court below.

CONSTITUTIONAL PROVISIONS AND STATUTES

Northern accepts the constitutional provisions and statutes set forth in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondents Northern and Enron Liquids Pipeline Co. are related business entities owned by Enron Corp. and operate pipelines through Nebraska and are subjected to ad valorem taxation as public service entities pursuant to Neb. Rev. Stat. §§ 77-801 to 804 (Reissue 1986). Pipelines, as well as certain other types of business property, including rail transportation property, are centrally assessed for ad valorem tax purposes by the Nebraska Department of Revenue.

Under Nebraska law the petitioning State Board of Equalization is charged with the responsibility of equalizing classes of property such that all property taxes are levied by value uniformly and proportionately with other taxpayers. Respondents appeared before the State Board for tax year 1988 requesting that the personal property component of their unit value[2] be equalized with the unit value of car line and railroad taxpayers (hereinafter "rail transportation property").

Rail transportation taxpayers successfully enjoined the imposition of Nebraska property taxes upon the personal property component of their unit value.[3] The rail taxpayers' property was enjoined from taxation by an application of a federal statute known as the Railroad

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[2] Locally assessed taxpayers pay ad valorem taxes in Nebraska based upon the fair market value of property located in the taxing jurisdiction on the first day of January for each tax year. Neb. Rev. State. § 77-201 and 77-1202. Centrally-assessed taxpayers' property is assessed by "unit value" methodology. That is, the entire value of the economic unit is determined for the utility as an entire economic unit. That total value is then apportioned to the local taxing jurisdiction. *See,* Neb. Rev. Stat. §§ 77-601 et seq. and 77-801 et seq. (Reissue (1986).

[3] Temporary and permanent injunctions were granted in *Trailer Train Co. v. Leuenberger,* CV87-L-29 (D. Neb. Dec. 11, 1987), *aff'd,* No. 88-1118 (8th Cir. Dec. 19, 1988), *cert. denied sub nom., Boehm v. Trailer Train Co.,* ___ U.S. ___, 109 S.Ct. 2065, 104 L.Ed.2d 630 (1989) ["Trailer Train"] (1986 tax year); *Burlington Northern R.R. Co. v. Leuenberger,* CV87-L-565 (D. Neb. Dec. 10. 1987) (1987 tax year); *Oklahoma Gas and Electric Co. v. Leuenberger,* CV88-L-52 (D. Neb. Jan. 26, 1988) (1987 tax year).

Revitalization and Reform Act (the "4-R Act"). To prevent the unreasonable burdening of interstate commerce that can result from discriminatory state and local taxation of rail carrier property, Congress enacted Section 306 of the 4-R Act. Pub.L. No. 49-210, § 306 (codified at 49 U.S.C. § 26c, recodified at 49 U.S.C. § 11503 in accordance with the Revised Interstate Commerce Act of 1978). The intent behind the passage of section 306 of the Act was to revitalize the rail carrier industry by prohibiting discriminatory state and local taxation. *See*, S. Rep. No. 1085, 92d Cong., 2d Sess. 3-4 (1972). The *Trailer Train* court found such discrimination to exist in Nebraska because of the exemptions for other types of personal property. (A1-18).

Northern appeared before the State Board of Equalization for tax year 1988 requesting that the Board exercise its power to equalize its unit value with the effective unit value of rail transportation property in accordance with art. VIII, sec. 1 of the Nebraska Constitution and the equal protection clause of the fourteenth amendment to the United States Constitution. The State Board dismissed Northern's request and Northern appealed to the Nebraska Supreme Court.[4]

The Nebraska Supreme Court reversed and remanded the State Board's dismissal of the Respondents' request. The court found that the State Board had the authority to entertain Northern's request. The *Northern* court stated:

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[4] Nebraska law provides for a direct, expedited appeal to the Nebraska Supreme Court from an adverse decision by the State Board of Equalization. Neb. Rev. Stat. § 77-510 (Reissue (1986).

> Article VIII, § 1, of the Nebraska Constitution provides in relevant part that except for motor vehicles, "[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property . . . ." It would seem that no question exists that if the Board arbitrarily undervalues a particular class of property so as to make another class of property disproportionately higher, or achieves the same result because of legislative action, this court must correct that constitutional inequity by lowering the complaining taxpayer's valuation to such an extent so as to equalize it with other property in the state. *See, Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984); *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987). This being the case, no logical reason exists why the same requirement of valuation reduction should not be imposed when the disproportionality is brought about by a final judgment of the federal court exempting the personal property of the railroads and car companies from the imposition of a state tax.
>
> The state, by not taxing the personal property of railroads and car companies, although acting involuntarily and under compulsion of federal law, nevertheless, by complying with that mandate, has denied Enron equal protection of the law contrary to the 14th amendment to the U.S. Constitution.

Northern Natural Gas Co. v. State Board of Equalization, 232 Neb. 806 at 815, 443 N.W.2d 249, 256 (1989).

The Supreme Court denied the State Board's Motion for Rehearing and the instant Petition for Writ for Certiorari was filed on December 28, 1989.

SUMMARY OF ARGUMENT

The opinion of the Nebraska Supreme Court in the *Northern* case is based upon adequate, independent state law grounds. Article VIII, section 1 of the Nebraska Constitution requires that all taxes be levied by value uniformly and proportionately amongst all classes of taxpayers. Prior precedent under Nebraska law in *State Bank of Omaha v. Endres*, 109 Neb. 753, 192 N.W. 322 (1923), directly supports the result reached by the Court. Moreover, there is no parallel provision to the Nebraska uniformity clause found in the federal constitution. The underlying litigation giving rise to the *Northern* case arises from a federal remedy statute, 49 U.S.C. 11503, and does not constitute a federal pre-emption of state taxation of railroads. All the federal law requires is that railroads not be treated differently than other classes of property.

Nebraska law requires that all other taxpayers be treated equally with railroads. Therefore, once the federal remedy was invoked by the railroads, the Nebraska uniformity clause mandated that like treatment be afforded other similarly situated taxpayers. In addition to the state law support, the federal equal protection clause affords relief to taxpayers engaged in interstate commerce to require those states to remedy disparate treatment by lowering the discriminated taxpayer to the same level of value as the preferred taxpayer. There being no rational basis for any difference in the taxation between railroads and pipelines, the pipelines were entitled to be treated equally.

For the reason that there is an adequate, independent state grounds basis for the decision and because the

federal grounds cited, if not consistent with existing federal law, represents at worst, an extension of protection not a diminution of federal rights giving rise to a constitutional question.

ARGUMENT

I

THE DECISION OF THE NEBRASKA SUPREME COURT IS BASED ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS AND, THEREFORE, THIS COURT IS WITHOUT JURISDICTION TO CONSIDER THE CASE.

In its Petition for Writ of Certiorari, Petitioner requests the Court to issue a writ of certiorari to review the decision of the Nebraska Supreme Court, for the reason that the Nebraska Supreme Court improperly interpreted and applied the provisions of the fourteenth amendment to the United States Constitution. A review of the opinion of the Nebraska Supreme Court in *Northern Natural Gas Co. v. State Board of Equalization*, 232 Neb. 806, 443 N.W.2d 249 (1989), however, reveals that the decision of the Nebraska court was primarily based on the court's interpretation and application of article VIII, § 1 of the Nebraska Constitution. Therefore, Respondents maintain that, under the principles set forth in *Michigan v. Long*, 463 U.S. 1362 (1983) and its progeny, this Court is without jurisdiction to review the federal issues presented by Petitioner. To demonstrate the reasoning which leads to the conclusion that this Court lacks jurisdiction, Respondents will: first, examine the body of case law concerning "independent and adequate" state law grounds; second,

examine language and reasoning employed by the Nebraska court in deciding the *Northern* case; and third, apply the tenets of jurisdiction derived from *Michigan v. Long* and its progeny to the decision of the Nebraska Supreme Court in *Northern*.

This Court's long-standing practice of refusing to review state court judgments which are supported by independent and adequate non-federal grounds is jurisdictionally based. If the Court were to issue an opinion regarding a federal issue which, by reason of an independent state law ground supporting the decision did not affect the ultimate outcome of the case, the Court's decision would be merely advisory. The U.S. Constitution, article III, § 2 limits this Court's jurisdiction to "cases" or "controversies." If an independent non-federal ground supports the decision rendered by the state court, then there is no case or controversy remaining for decision.

The current rule of law concerning the presence of independent and adequate state grounds sufficient to defeat this Court's jurisdiction has its origins in the case of *Michigan v. Long*, 463 U.S. 1032 (1983), which sets forth what has been termed the "plain statement rule." In *Long*, the Michigan Supreme Court ruled that a police officer's search of the interior of a defendant's automobile was not justified under *Terry v. Ohio*, 392 U.S. 1 (1969). In reaching this conclusion, the Michigan court relied exclusively on federal cases interpreting the fourth amendment to the U.S. Constitution. Having failed to rely on a single Michigan case interpreting the parallel Michigan constitutional provision, the Michigan court concluded that "the deputies' search of the vehicle was proscribed by the fourth amendment to the United States Constitution and article

1, § 11 of the Michigan Constitution." *People v. Long*, 413 Mich. 461, 472-73, 320 N.W.2d 866, 870 (1982).

On certiorari, this Court reversed and remanded. Before reaching the substantive issues presented by the case, the Court disposed of Long's contention that the decision of the Michigan court was based on independent and adequate state grounds. In so doing, the Court established the criteria for an analysis which should be utilized when determining whether an independent and adequate non-federal ground supports the judgment of a state court. The *Long* Court stated:

> "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground . . . . Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so . . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."

Michigan v. Long, supra, 463 U.S. at 1040-41.

Noting that the Michigan Supreme Court "relied *exclusively* on its understanding of *Terry* and other federal cases," the Court held that the decision below was not based on an independent state ground. *Id.* at 1043. Thus,

although the Michigan court had cited to a provision of the Michigan Constitution, it was apparent from the face of the decision that the court's interpretation of that provision was guided and controlled by the court's perception of federal constitutional law.

In order to defeat the exercise of jurisdiction by this Court, the judgment of the state court must be supported by state law grounds which are both "independent of the merits of the federal claim" and an "adequate basis for the court's decision." *Harris v. Reed*, 489 U.S. ___, at ___, 109 S. Ct. 1038, 1042, 103 L. Ed.2d 308, 315 (1989). The rule set forth in *Long* is designed to avoid difficulties associated with ambiguity as to the basis of a state court's decision. The "plain statement" rule of *Long*, however, applies only in circumstances where the decision of the state court rests "primarily on federal law," or is "interwoven with the federal law." Obviously, in situations where the decision is based primarily on state law, any review of federal issues would be advisory.

The mere citation of an independent and adequate state law ground is, in and of itself, insufficient to defeat jurisdiction absent the state court's reliance upon the ground to dispose of the case. "The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must have actually relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). However, where a state court disposes of an appeal primarily by reference to and reliance on state law grounds, the United States Supreme Court lacks jurisdiction to consider the case in spite of the state court's comments on or reference to federal law.

The *Northern* case involved an appeal to the Nebraska Supreme Court by Respondents from a decision of the Nebraska State Board of Equalization denying Respondents' request for personal property tax equalization. Respondents had based their request, in substantial part, on article VIII, § 1 of the Nebraska Constitution which provides *inter alia*: "Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises. . . ." This provision is unique to the Nebraska Constitution and there is no parallel provision in the federal constitution. In numerous cases the Nebraska Supreme Court has strictly enforced the uniformity clause to strike down discriminatory state tax practices.[5]

"Equalization" is a state law requirement that all property taxpayers must be taxed at the same level of value. The term should not be confused with "equal protection." The basis for equalization relief will be developed further under Argument II, *infra*. In its original brief before the Nebraska Supreme Court, Northern

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[5] For background see, *Equitable Life Assurance Society v. Lincoln County Board of Equalization*, 229 Neb. 60, 425 N.W.2d 320 (1988) (shopping mall must be equalized with agricultural land); *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987) (constitutional amendment to permit classification of property invalid as violating uniformity clause); *Xerox Corp. v. Karnes*, 217 Neb. 728, 350 N.W.2d 566 (1984) (biennial tax assessments violate uniformity clause); *Homan v. Boone County Board of Equalization*, 141 Neb. 400, 3 N.W.2d 650 (1942) (realty cannot be valued lower than other tangible property).

devoted eight pages to its state equalization law argument and five pages to the federal equal protection argument. In its original Appellee's Brief to the Nebraska Supreme Court, the State Board devoted twenty pages to the state law argument and three pages to the equal protection argument. The primary thrust of both litigants focused on the state law requirements for equalization.

After finding that the State Board of Equalization had jurisdiction to grant the requested equalization, the *Northern* Court noted that:

> "Article VIII, § 1, of the Nebraska Constitution provides in relevant part that except for motor vehicles '[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property . . . .' It would seem that no question exists that if the Board arbitrarily undervalues a particular class of property so as to make another class of property disproportionately higher, or achieves the same result because of legislative action, this court must correct that constitutional inequity by lowering the complaining taxpayer's valuation to such an extent so as to equalize it with other property in the state. *See, Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984); *Banner County v. State Board of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987). This being the case, no logical reason exists why the same requirement of valuation reduction should not be imposed when the disproportionality is brought about by a final judgment of the federal court exempting the personal property of railroads and car companies from the imposition of a state tax."

Northern Natural Gas Co. v. State Board of Equalization and Assessment, supra, 232 Neb. at 815, 443 N.W.2d at 255-56.

After announcing its conclusion regarding Respondents' claim under article VIII, § 1 of the Nebraska Constitution, which is dispositive of the appeal, the court announced its further conclusion that the State, by complying with the mandate of the federal court, "has denied [Respondents] Enron equal protection of the law contrary to the 14th amendment to the U.S. Constitution." *Id.* at 815, 443 N.W.2d at 256 (*citing Sioux City Bridge v. Dakota County*, 260 U.S. 441 (1923)).

Finally, with respect to the value of the portion of Respondents' property consisting of real property, the court held:

> "In *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984), we held that the uniformity clause of the Nebraska Constitution required that the complaining taxpayer's land had to be valued at 44 percent, the lowest ratio of assessed valuation to actual valuation. We had concluded that although the taxing authorities may classify different types of property for taxation purposes, nevertheless, the results reached by such different methods and reasonable classifications must be correlated so that the valuations reached shall be uniform and proportionate. The record in this case does not support such a favorable finding for the Board.
>
> Although article VIII, § 1, of the Nebraska Constitution was amended in 1984 in an attempt to permit the valuation of agricultural land by a different method, this court concluded that the result must be correlated with the value of all other land. At the risk of being redundant, we state such a result has not been reached in this case.

> The Board has asked us to reconsider our decision in *Banner County v. State Board of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987). There is nothing to reconsider. Neb. Const. art. VIII, § 1, providing that '[t]axes shall be levied by valuation *uniformly and proportionately*' (emphasis supplied), to say nothing of the 14th amendment to the U.S. Constitution, which directs that no state shall 'deny to any person within its jurisdiction the equal protection of the laws,' both remain viable and in full force and effect. *Banner County* could be written in no other way."

Northern Natural Gas Co. v. State Board of Equalization and Assessment, 232 Neb. at 822-23, 443 N.W.2d at 259-60.

Respondents acknowledge the presence of language within the *Northern* case which implies an application of federal constitutional rights. However, Respondents maintain that the substantial basis supporting the Nebraska court's reasoning lies in article VIII, § 1, of the Nebraska Constitution. A review of the Nebraska cases cited in *Northern* reveals a body of case law, developed independently of federal law, which is indigenous to Nebraska jurisprudence, and without parallel under federal law. Moreover, even if the Nebraska court's conclusion regarding the fourteenth amendment to the U.S. Constitution is construed as a "holding" of the *Northern* case, the decision of the Nebraska court is not reviewable by this Court due to the presence of an independent state constitutional ground.

In support of its state law decision in *Northern*, the Nebraska court cited and relied on at least two Nebraska cases: *Kearney Convention Center v. Board of Equalization*, 216 Neb. 292, 344 N.W.2d 620 (1984); *Banner County v. State Board of Equalization and Assessment*, 226 Neb. 236,

411 N.W.2d 35 (1987). In both of these cases, the Nebraska Supreme Court relied on the "uniformity clause" of the Nebraska Constitution to invalidate certain taxing practices. Neither case concerns federal constitutional guarantees.

The reason behind the independent development of case law interpreting Nebraska's "uniformity clause" seems clear: there is no corresponding federal constitutional provision which provides quite the same protection as article VIII, § 1 of the Nebraska Constitution. The language of the uniformity clause is substantially dissimilar to the language of the fourteenth amendment. Therefore, the Nebraska courts have developed an independent body of case law designed to assist in interpretation of the uniformity clause of the Nebraska Constitution. *Cf. Gas 'N Shop v. Nebraska Liquor Control Commission*, 229 Neb. 530, 427 N.W.2d 784 (1988) (Appellant's claim that a city ordinance violated Nebraska constitutional prohibition against "local or special laws," Neb. Const. art. III, § 18, analyzed in a similar manner to a federal equal protection claim.)

The present case differs from those where the state court decision merely appears to be based on alternative state and federal grounds arising from similar language in state and federal constitutions. *See Michigan v. Long, supra.* When, as in *Long*, a state court interprets a state constitutional provision which is modeled after and similar to a federal provision, it is safe to assume that the state court was guided by federal law. However, when a state court announces a conclusion with respect to a distinctive state constitutional guarantee and in reliance

on state law, and for which there is no federal counterpart, the assumption that the court relied on federal law cannot be fairly made.

II

PROPERTY IN THE SAME CLASS MUST BE ASSESSED AND LEVIED UNIFORMLY AND PROPORTIONATELY IN ORDER TO COMPLY WITH THE NEBRASKA CONSTITUTION REGARDLESS OF THE SOURCE OF THE DISPARITY.

In its original brief on appeal, Respondents urged two reasons for reversal of the State Board of Equalization decision denying equalization of its unit value with the unit value of railroads and car line companies. *Northern* based its primary argument on article VIII, section 1, of the Nebraska Constitution, the uniform and proportionate clause. This provision requires that all property in a class be taxed at the same level of value. Under the doctrine of *State Bank of Omaha v. Endres*, 109 Neb. 753, 192 N.W. 322 (1923), and subsequent Nebraska cases, the court's guidance for its decision in the *Northern Natural Gas Co.* case could not be more clear. The facts under *Endres* and the facts under *Northern* are not just similar, they are virtually identical.

Endres arose because the United States Supreme Court had held that federal banks could not be taxed differently than other classes of property within a state. The Supreme Court in *Merchants' Nat'l Bank v. City of Richmond*, 256 U.S. 635 (1921) held that because of federal legislation, the states could not tax intangibles held by federal banks at a greater rate than intangibles held by individuals in a state. In *Endres* the Nebraska Court ruled

that article VIII, section 1, of the Nebraska Constitution mandated the same result for intangibles held by Nebraska state banks.

The *Endres* decision is not the only precedent for this proposition. In fact, the court's rulings construing the uniform and proportionate requirements of the Nebraska Constitution are clear and consistent. Where one member of a class of property is taxed at full value and another member is taxed at less than full value, the only remedy is reduction in the fully taxed property to the level of the preferred class. *Kearney Convention Center v. Buffalo County Board of Equalization*, 216 Neb. 292, 344 N.W.2d 620 (1984).

It is no longer disputed that in light of the *Trailer Train* progeny of litigation, Nebraska will not be able to tax rail transportation property at full value. Respondents merely sought the same treatment so that their property would be uniformly valued and taxed the same as other centrally-assessed property in the same class, i.e., rail transportation property. Petitioner urges that equalization does not apply because of "federal pre-emption of railroad taxation." It is respectfully submitted that the *Northern* court reached the same result as the *Endres* court and did so because of exactly the same underlying basis set forth in *Merchants' Bank, supra*, and not because of "federal pre-emption" of state taxing powers.

Federal law did not carve an "exemption" in the technical sense of that word. That is, Congress did not pass legislation which prohibited the taxation of railroad property. Rather, federal law merely provides a federal

court remedy for state discrimination which taxes railroads at the highest rates or in any other manner discriminates against rail transportation. 49 U.S.C. § 11503. *See, Department of Revenue, State of Florida v. Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987).

The Nebraska rail carriers proved discrimination existed which entitled them to pay taxes at less than actual value. *See* footnote 3, *supra*. Under Nebraska law the taxing officials had to remedy the discrimination or afford similar treatment to other taxpayers in the same class. Failing to do so violated both state and federal requirements.

III

THE PURPOSE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IS TO SECURE EVERY PERSON WITHIN THE STATE'S JURISDICTION AGAINST INTENTIONAL AND ARBITRARY DISCRIMINATION.

Petitioner goes to great length to urge upon this Court that *Northern* has broken new ground in the area of equal protection as applied to state taxation. Respondents assert that at worst, the *Northern* court extended greater rights to a citizen taxpayer, not less protection than that which is required under existing federal court cases.

Petitioner suggests that after the *Northern Natural Gas Co.* no system of state statutory tax exemptions is possible. This argument is based, apparently, upon the logic that if even one exemption is granted by a legislature,

then the equal protection clause of the fourteenth amendment would require that all other property be exempt. Nothing could be further from the truth.

In *Burlington Northern R.R. Co. v. Bair*, 584 F. Supp. 1229 (S.D. Iowa 1984), *aff'd*, 766 F.2d 1222 (8th Cir. 1985), the court addressed the issue of whether or not the 4-R Act, much the less the federal constitution, mandated that railroad property receive relief merely because there were statutory exemptions present for some classes of property. The *Bair* Court stated:

> The court realizes that some classification systems may have such minor discriminatory impact on transportation property owners that they would not violate section 306. The Iowa personal property tax plan, however, affecting such a large portion of property in Iowa and designed to exempt select types of personalty from taxation, is not of that sort.
>
> In addition, the Court does not imply that transportation property should be compared to types of property that are traditionally tax-exempt, such as property owned by churches and charitable institutions and homesteads.

584 F. Supp. at 1235, n. 4.

Respondents did not urge that a legislature cannot enact reasonable classifications and reasonable exemptions of personal property. In fact, that proviso is expressly set forth in article VIII, section 2, of the Nebraska Constitution, to wit: "The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation. No property shall be

exempt from taxation except as provided in the Constitution."

There was no exemption for railroad property provided under Nebraska law during the period in question. Moreover, as previously discussed, there is no "exemption" provided by federal law. Because of a discriminatory state taxation system in which virtually all personal property is not taxed, federal law mandates that railroads should receive like treatment. (A.1-18). There being no rational basis for treating pipelines any differently, equal protection should be afforded the property of pipelines as well as other classes of centrally assessed personal property.

Petitioner relies upon *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959), for the proposition that exemption from state taxation for one class does not require that all classes be treated equally under the fourteenth amendment to the U.S. Constitution. Respondents do not disagree with that general principle. However, it is respectfully submitted that *Allied Stores* does not stand for the proposition that the equal protection clause should not be considered, but rather, that in that particular case relief was not warranted because there was a reasonable classification which did not discriminate against interstate commerce. *See*, concurring opinion by Justice Brennan and Harlan citing *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949), in which the equal protection clause was relied upon by the Court to strike down discriminatory taxation.

In the recent case of *Allegheny Pittsburg Coal Co. v. County Comm'n, Webster County, West Virginia*, ___ U.S.

___, 109 S. Ct. 653, ___ L. Ed.2d ___ (1989), the Court reached a similar result on different facts. *See also, Sioux City Bridge v. Dakota County*, 260 U.S. 441 (1923). While those cases are traditional disputes arising under valuation schemes, the same logic and principles apply here because of the broad based discrimination and the fact that railroad unit values will not be taxed at full value after *Trailer Train* while the unit values of pipelines would be taxed at full value.

In effect, when the discrimination approaches, in the aggregate, the level of discrimination present in *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 206 (8th Cir.) *cert. denied*, 454 U.S. 1086 (1981), and *Trailer Train*, the state must not only justify the individual exemptions as analyzed under *Allied Stores* but, must also support the rational basis for exempting 75 to 80 percent of commercial and industrial personal property, thereby requiring the remaining 20 to 25 percent to carry the full tax burden. *Burlington Northern R.R. Co. v. Bair*, 584 F. Supp. 1229 (S.D. Iowa 1984), *aff'd*, 766 F.2d 1222 (8th Cir. 1985).

Subjecting the Nebraska exemption scheme to such an analysis, the scheme must fail. Moreover, cursory examination of the exemptions demonstrates that the legislature has attempted to protect domestic property while taxing interstate utilities and railroads at full value. Under such facts, equal protection is violated. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612 (1985).

It is respectfully submitted that the legislature has within its power the ability to devise a proper scheme and system for achieving the necessary legislative goal of

raising taxes, providing for reasonable, rationally based exemptions, yet still protecting the rights of railroads as well as other classes of taxpayers from arbitrary discrimination. The *Northern Natural Gas Co.* decision cannot be read, and should not be read, to suggest that the presence of *any* exemption would require that *no* other taxpayer's property could be taxed. *See*, e.g., *Department of Revenue, Florida v. Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987), wherein the court stated: "We find no authority requiring untaxed property to be included in an average of assessed value for taxed property." 830 F.2d at 1571, citing *ACF Industries, Inc. v. Arizona*, 714 F.2d 93 (9th Cir. 1983). Nothing in *Northern* is inconsistent with *Allied Stores* or violates federal principles.

Any reliance upon *State v. Colonial Pipeline Co.*, 471 So. 2d 408 (Ala. 1984) and *Federal Express Corp. v. Tennessee State Board of Equalization*, 717 S.W.2d 873 (Tenn. 1986) is misplaced because their state constitutions permit classification and the cases arose prior to the U.S. Supreme Court's application of the equal protection clause in *Allegheny Pittsburg Coal Co., infra. Moreover*, three judges in *Colonial Pipe* strongly dissented in a well-reasoned opinion which tracks the Nebraska court's reasoning in *Northern*. At best those cases are nothing more than divergent opinions on state tax matters, not fundamental constitutional law interpretations. Lack of uniformity in state taxation is well documented.[6] A difference amongst states

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[6] *See*, W. Newhouse, *Constitutional Uniformity and Equality in State Taxation* (2d ed. 1984).

on tax principles does not give rise to a violation of federal law even if *Northern* might have been decided differently by an Alabama or Tennessee court.

CONCLUSION

It is respectfully submitted that the Nebraska Supreme Court's decision in *Northern Natural Gas Co.* is amply supported by *State Bank of Omaha v. Endres* and other previous decisions of the Nebraska court construing article VIII, section 1, of the Nebraska Constitution and therefore jurisdiction to grant certiorari is absent. Further, the decision is supported by the fourteenth amendment to the United States Constitution and cannot be read as an interpretation of federal law which impairs the rights of states to properly classify and exempt property from taxation.

Therefore, it is respectfully submitted that the Writ of Certiorari should be denied.

Respectfully submitted,

NORMAN H. WRIGHT
Counsel of Record
JOHN K. BOYER
AMY S. BONES
FRASER, STRYKER, VAUGHN, MEUSEY,
OLSON, BOYER & BLOCH, P.C.
500 Energy Plaza
409 South 17th Street
Omaha, Nebraska 68102-2663
(402) 341-6000

Attorneys for Respondents
Northern Natural Gas Co.
Enron Liquids Pipeline Co.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

TRAILER TRAIN COMPANY, RAILBOX COMPANY, AND RAILGON COMPANY,	)	CV87-L-29
Plaintiffs,	)	MEMORANDUM OPINION FOLLOWING ORAL ARGUMENTS
vs.	)	
DONALD S. LEUENBERGER, TAX COMMISSIONER OF THE STATE OF NEBRASKA,	)	
Defendant.	)	

This memorandum sets forth the court's analysis of the only claim presented in the first part of this bifurcated trial. The plaintiffs, Trailer Train Co., and its wholly-owned subsidiaries, Railbox Co. and Railgon Co., (hereinafter referred to collectively as "Trailer Train") claim that the levy and collection of Nebraska's *ad valorem* tax on their tangible personal property violates section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"), Pub. L. 94-210, 90 Stat. 31, 54 (codified at 49 U.S.C. §11503) that prohibits taxes that discriminate against common carriers by rail. The plaintiffs and the defendant,. Tax Commissioner Donald Leuenberger, have stipulated to the facts concerning this first claim and oral arguments were presented to the court on the unresolved legal issues.

Trailer Train furnishes rail cars to railroads, thereby enabling railroads to obtain and use standardized types

of rolling stock without the individual burdens of ownership. Trailer Train has no property permanently located in Nebraska; its only relationship to Nebraska stems from the fact that its rail cars are located or operated in the state by the railroads. All of the taxes disputed in this lawsuit were assessed after February of 1979, the effective date of the 4-R Act.

Simply put, the controversy is whether Nebraska's personal property taxation system, which provides for extensive exemptions from personal property tax under section 77-202, violates section 306(1) (d) of the 4-R Act. According to the parties' stipulation of facts, the section 77-202exemptions exclude from taxation 75.75 percent of the commercial and industrial personal property in the state. The plaintiffs contend that the exemptions effectively nullify the nondiscriminatory character of Nebraska's facially neutral statute that requires all personal and real property that is not specifically exempted to be taxed. See Neb. Rev. Stat. §77-202. The plaintiffs claim that the exemptions violate section 306(1) (d) and the spirit of the 4R Act. The defendants argue that Nebraska's taxation scheme is nondiscriminatory, and that, in any event, the group of property with which the plaintiffs want their property to be compared is restricted under section 306(3) (c) to that property that is "subject to a tax levy." The defendant contends that this restriction excludes the exempted property from the comparison group and therefore that all the taxpayers are treated fairly and equally.

The cornerstone of Nebraska's personal property taxation system is found in Neb. Rev. Stat. §77-201 (Reissue 1986) that provides that "all tangible personal and real

property that is not expressly exempt, is subject to taxation and will be valued at its actual value." The valuation of rail car lines, however, is guided by other statutes. In an attempt to value the car lines as going concerns, section 77-624 requires the president or chief officer of any car company to submit a statement to the tax commissioner that includes "(1) the aggregate number of miles made by each class of their cars on the several lines of railroad in this state during the preceding year ending December 31, (2) the aggregate number of miles made by each class of their cars on all railroad lines during the preceding year ending December 31, and (3) the total number of cars of each class owned by the company, individual, or firm." The information provided in that statement is used by the commissioner to ascertain and fix the valuation of each particular class of cars, as closely as possible to their actual values. The cars are then assessed based on that valuation. *See* Neb. Rev. Stat. §77-626 (Reissue 1986).

The types of property that are exempt from the tangible personal property tax imposed under section 77-201 are listed in section 77-202 and include motor vehicles; most agricultural income-producing machinery; business inventories; feed, fertilizer, and farm inventory; and grain, seed, livestock, poultry, fish, honeybees and fur bearing animals. Trailer Train's rolling stock does not qualify for any statutory exemption. For the year 1986, Trailer Train's rolling stock will be taxed at 86.81 percent of its value -the equalization rate applied to all centrally assessed property subject to taxation in Nebraska for that year.

Section 306(1) of the 4-R Act states in part:

> " . . . It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> (a) The assessment (but only to the extent of any portion based on excessive value as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.
>
> * * *
>
> (d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part."

Pub. L. No. 94-210, 90 Stat 54 (Feb. 5, 1976). Commercial and industrial property as used in section 306 means "all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy." *Id.* at 306(3) (c). Because the original language of section 306 was changed when it was codified, references will be to section 306 rather than to 49 U.S.C. §11503. The parties have stipulated in the order on final pre-trial conference, filing 17, that the provisions of section 306 control.

Some of the legal issues that are important to the resolution of the plaintiffs' claim have been resolved

already by the Eighth Circuit Court. In *Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468, 471-72 (8th Cir. 1983), the court held that the protections of section 306(1)(d) extend to private car lines as well as common carriers by rail. The language of section 306(1)(d) itself was instrumental in the court's reasoning. That section prohibits any tax that "results in discriminatory treatment of a common carrier by railroad." Recognizing the close historic and economic relationship of railroads to car lines, the court stated that any discriminatory tax on rail car lines will "result in discriminatory treatment" to common carriers by railroad. *Id.* Thus, a tax need not be directly imposed on the railroad in order to be prohibited by section 306(1) (d). This position has been adhered to in *Trailer Train Co. v. Bair*, 765 F.2d 744 (8th Cir. 1985) and adopted by the Eleventh Circuit in *Department of Revenue v. Trailer Train Co.*, No. 87-3093, slip op., 362, 369 (11th Cir. Nov. 2, 1987). *See also General American Transporation Corp., V., Louisiana Tax Commissioner*, 680 F.2d at 400, 403 (1982) (finding that car lines should not be denied protection of the 4-R Act under section 306(1) (a)).

A case from the northern district of California, discussed in the defendant's brief, has held that private car lines are not entitled to protection under section 306(1) (d). The court reasoned that the "common carrier by railroad" language of the provision constitutes words of limitation under the traditional doctrines of statutory interpretation. Accordingly, the court held that rail car lines were explicitly excluded from the protection of section 306(d) (1) *Trailer Train Co. v. State Board of Equalization*, 538 F.Supp. 509 (N.D. Cal. 1982). Nevertheless, this court will follow the precedent of the Eighth Circuit in

recognizing that Trailer Train is entitled to the same protection afforded to railroads under section 306(1)(d).

The plaintiffs rely heavily on the Eighth Circuit cases of *Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir. 1981), *cert denied*, 454 U.S. 1086 (1981), and *Burlington Northern Railroad Co. v. Bair*, 584 F.Supp. 1229 (S.D. Iowa 1984) *aff'd* 766 F.2d 1222 (8th Cir. 1985), in arguing that the Nebraska personal property tax scheme is discriminatory. Nebraska's tax commissioner relies primarily on statutory interpretation, the definition of commercial and industrial property in section 306(3) (c) and the reasoning of the foregoing case from the Northern District of California in arguing that the Nebraska scheme treats all taxpayers in the same way and, therefore, that the tax is not discriminatory under section 306(1) (d).

In *Ogilvie, supra*, the Eighth Circuit affirmed the district court's decision that section 306 prohibited North Dakota's assessment of a discriminatory tax against a railroad. The North Dakota system exempted from *ad valorem* taxation all the personal property of locally assessed businesses but subjected the personal property of centrally assessed businesses to an *ad valorem* tax on their personal property. North Dakota argued that its system was nondiscriminatory because the locally assessed businesses were subject to a business privilege tax in lieu of a personal property tax.

The Eighth Circuit court's consideration of the case began with a restatement of the goal of the 4-R Act: "to eliminate the long-standing burden on interstate commerce resulting from discriminatory State and local taxation of common and contract carrier transportation

property." *Ogilvie*, 657 F.2d at 206 quoting S. Rep. No. 1483, 90th Cong., 2d Sess., 1 (1968). The court, quoting the district court opinion, stated that " '[t]he most obvious form of tax discrimination is to impose a tax on a class of rail transportation property that is not imposed on other non-railroad property of the same class.' " *Id.* at 210. The court applied section 306(1) (d) to find that the distinction between locally assessed businesses and centrally assessed business imposed an unfair tax burden on the railroad. The Eighth Circuit, reiterating that section 306 was designed to "prevent tax discrimination against railroads in any form whatsoever," held that the North Dakota scheme was in violation of section 306. *Id.*

The plaintiffs also rely on *Burlington Northern Railroad Co. v. Bair, supra,* in which the railroad challenged Iowa's tax assessment rollback plan that, over time, completely excluded from personal property taxation certain items of and owners of personal property. Under the Iowa plan, the assessed value of most personal property was rolled back to 1973 values and the state granted tax credits against the rolled back, assessed value of most tangible personal property. The personal property owners who benefitted from the plan constituted 95 percent of all personal property owners in the state. The district court likened the credits to exemptions for the purpose of a section 306 analysis because the credits served to reduce the valuation figure to which the tax rate was applied. *Burlington Northern R. Co. v. Bair,* 584 F. Supp. 1229, 1232 (S.D. Iowa 1985). Those categories of property that were statutorily excluded from the tax rollback plan included any personal property owned by a public service company, any machinery used in manufacturing, computers

and transmission towers and antennae. The district court found that the rollback plan violated section 306(1) (d) because the majority of selected classes of property were not subject to the tax and the railroads were.

The Eighth Circuit affirmed the district court's decision and found that Iowa's classification scheme resulted in obvious discrimination against the railroad "by excluding it from the benefits of personal property tax rollbacks and credits which most other taxpayers enjoy." *Bair*, 766 F.2d at 1224. The court stated that "[t]his type of *de jure* discrimination clearly falls within the prohibition of section 306(1) (d)." *Id.* The court rejected the department of revenue director's argument that section 306(1) (d) applied only to taxes other than property taxes in stating:

> [S]ection 306(1) (a) covers claims of unequal valuation ratios between railroad and other commercial and industrial property, but not classification discrimination as is presented here. Section 306(1) (d) is a broad provision intended to reach all types of discriminatory tax treatment. The fact that certain other taxpayers, besides railroads, also are denied the personal property rollbacks and credits does not mitigate the discrimination.

Id. at 1224. The Eighth Circuit narrowed the effect of its holding, however, in stating:

> Although we find Burlington Northern is entitled to the same benefits as most other taxpayers – rollback and credit-it is not entitled to total exemption. In applying section 306(1) (d), we find that if Burlington Northern's personal property is of such value that tax is still due after the rollback and credit, it must pay tax like

> any other substantial property owner. A difference in taxation based purely on wealth is not within the prohibition of section 306(1) (d).

Id. at 1224.

The Eighth Circuit in *Ogilvie* clearly established that the court had adopted a broad interpretation of section 306. The *Bair* court distinguished between the types of discrimination prohibited by the Act – discriminatory valuation ratios and discriminatory classifications – and found that section 306(1) (d) is available in cases in which section 306(1) (a) or 306(3)(c) seems to prevent a remedy. The scope of section 306(1) (d) was found to extend to classification discrimination according to the *Bair* court.

A general comparison of *Ogilvie, Bair* and the case at bar present reflect basic similarities. In *Ogilvie,* North Dakota imposed a discriminatory tax only on railroad personal property and not on any other class of personal property. In *Bair,* all the personal property owners in Iowa, with the exception of a minority of statutorily omitted owners including railroads, received the benefits of tax credits and tax rollbacks. Under the Nebraska scheme, the majority of the personal property in the state is statutorily exempted from taxation, while a minority of personal property, including all the property that belongs to Trailer Train in the state, is subject to an *ad valorem* tax on its actual value. I recognize that the mechanics of the tax schemes involved in these cases differ significantly. The systems in *Ogilvie* and *Bair* favored the majority of taxpayers, either by exempting them from taxation or taxing them at 1973 values, but expressly denied the railroads similar favorable treatment. In this case, the Nebraska system favors a majority of the property of

possible taxpayers by exempting that property from taxation but denies the property of rail car lines the same favorable treatment. I find that the mechanical differences between the systems are immaterial under the Eighth court's result-oriented analysis of section 306(1) (d) claims.

The ultimate effect of the taxation scheme in each case, *Ogilvie, Bair* and the one commenced by Trailer Train in this court, is that the majority of possible taxpayers or the majority of the property benefitted from the taxation schemes, while a minority, including the railroads and car lines or their property, were burdened. The *Bair* case indicates that the discrimination caused by the Nebraska scheme is of the type that is prohibited by section 306(1) (d) because the result is to exclude Trailer Train from the benefits of personal property tax exemptions that most other taxpayers enjoy. *See Bair*, 766 F.2d at 1224. The issue presented in this first claim. is not a question of unequal, valuation ratios. between the car lines and other commercial and industrial.property, which would be properly brought under section 306(1) (a) and would invoke the definition of commercial and industrial property under section 306(3)(c). Rather, the issue is one of classification discrimination. *Id.*

While the *Ogilvie* and *Bair* cases are helpful to this court in characterizing the Eighth Circuit Court's approach to alleged violations of section 306, cases from other circuit courts have much to add to the analysis. The plaintiffs direct the court to the Eleventh Circuit Court's No. 87-3093, slip. op. 362 (Nov. 2, 1987). In that case, Trailer Train argued that Florida's assessment of its property at 100 percent of its market value, while totally

exempting all business inventory from taxation, violated sections 306(1) (a) and 306(1) (d) of the 4-R Act. The Eleventh Circuit Court agreed with the district court's determination that Florida's failure to include the value of business inventory in the assessed value of "other commercial and industrial property" did not violate sections 306(1) (a) and 306(3) (c) because the business inventory was not "subject to a property tax levy" and thus was omitted from the definition of commercial and industrial property. *Id.* at 365. However, the court found that "§306(1) (d) requires consideration of tax exemptions in determining whether there has been discriminatory treatment." *Id.* at 369. Finding that the district court was in a more able position to determine whether a total business inventory exemption resulted in discriminatory tax treatment to the car line, the Eleventh Circuit remanded the case to the district court. In doing so, the court noted its agreement with the Fourth Circuit's conclusion:

> In essence, discrimination is a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored.

Id. at 370, quoting *Richmond, Fredericksburg & Potomac R. Co. v. Department of Taxation*, 762 F.2d 375, 380 n.4, (4th Cir. 1985). I too, agree that this conclusion is prudent and that it can aid me in deciding section 306(1) (d) claims. Furthermore, the Eleventh Circuit recommended:

> In making such determination [as to whether an exemption resulted in discriminatory treatment], the court should consider whether it would be appropriate for it to consider the entire tax structure as applied against railroads

> and as applied against 'all other commercial and industrial businesses.'

Id. at 370 quoting *Alabama Great Southern Railroad Co. v. Eagerton*, 663 F.2d 1036, 1041 (11th Cir. 1981).

Trailer Train also relies upon *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368 (5th Cir. 1987), which involved a challenge to Louisiana's transportation and communications tax that only applied to public utilities as they were defined under Louisiana law. The court acknowledged that in enacting the 4-R Act, "Congress was most concerned with property tax discrimination, and it voiced that concern in detail in §306(1) (a)-(c); but it included [§306(1) (d)] to ensure that states did not shift to new forms of tax discrimination outside the letter of the first three subsections." *Id.* at 373-74. Accordingly, the court found that section 306(1) (d) prohibited "all forms of tax discrimination against railroads by states." *Id.* at 374.

The Fifth Circuit determined that "[t]he only simple way to prevent tax discrimination against the railroad is to tie their tax fate to a large group of local taxpayers. A large group of local taxpayers will have the political and economic power to protect itself against an unfair distribution of the tax burden." *Id.* at 377. The court reasoned that a large, local group could rally the economic and political power that a small and foreign group would be unable to muster. Because the Fifth Circuit found that the railway's tax fate was tied to a small, foreign group, the court held that Louisiana's tax system discriminated against railroads in violation of section 306(1) (d).

The court recommended that the railway be "taxed only under taxes applicable to 'other commercial and industrial' taxpayers." Using the 'other commercial and industrial taxpayers' as the large, local group whose fate the railway would tie into was intended to thwart any attempt by the state to "discriminate against the railroads by simply making sure that only a few powerless business taxpayers pay 'the same type of tax' as the railroad." *Id.* at 375, n.13. The Eighth Circuit has interpreted section 306(1) (d) of the Act in a result-oriented fashion. Due to this interpretation, the protection from "any other" discriminatory tax has been extended by the Eighth Circuit to rail car lines under section 306(1) (d).

According to the Eleventh and Fifth Circuit court opinions, a broad interpretation of section 306(1) (d) is warranted. The Eleventh Circuit in *Department of Revenue, supra,* stated outright that exemptions should be considered in determining whether the state has levied a discriminatory tax on the railroad in violation of section 306(1) (d). Moreover, the Eleventh Circuit acknowledged that when a state favors one person to the disadvantage of another person, that state must demonstrate a reasonable distinction which justifies the differential treatment.

The tax commissioner's arguments are not persuasive. Leuenberger asserts that *Trailer Train v. State Board of Equalization,* 538 F. Supp. 509 (N.D. Cal. 1982) should control the disposition of this case. The plaintiff in that case challenged California's system of personal property taxation as discriminatory under sections 306(1) (a) and 306(1) (d) of the 4-R Act because a statute totally exempted business inventories from taxation. The federal district court in California determined that the exemption

was not in violation of the Act. The court reasoned that section 306(3)(c)'s definition of commercial and industrial property, which limits commercial and industrial property, in part, to any property that is subject to a tax levy, demonstrates Congress' intention to exclude exempt property from the total assessed value of taxable property. The court stated that "if a type of property is 'exempted' then it is not subject to such a levy and would not constitute any part of the aggregate property for comparison purposes." *Id.* at 512. Based on this analysis, the court found that the statutory exemption did not violate section 306(a)(1). However, the court's rejection of the plaintiff's section 306(1)(d)-claim was based on two reasons: (1) any discrimination resulted from the "disparate treatment of available tax exemptions as opposed to discrimination in the assessment ratio or tax rate." *Id.* at 513 and (2) only "common carriers by rail" and not car lines could claim protection under section 306(1)(d) based on a literal reading of that section. Both reasons have been foreclosed in this circuit, where it has been said that car lines, as well as railroads, are protected by section 306(1)(d) and that classification discrimination is prohibited by that section. *Burlington Northern Railroad Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985).

The tax commissioner also relies upon *Atchison, Topeka & Santa Fe Ry. v. State of Arizona*, 559 F. Supp. 1237 (D. Ariz. 1983) and *Clinchfield R. Co. v. Lynch*, 784 F.2d 545 (4th Cir. 1986). The *Atchison. Topeka* plaintiffs challenged as discriminatory the state's valuation of their railroad property. The court relied upon the statutory definition of commercial and industrial property found in section 306(3) (c) to find that "property which is for any reason

tax-exempt is excluded as a form of commercial and industrial property." *Atchison, Topeka,* 599 F. Supp. at 1245. Using that definition, the court decided that manufacturers' inventories were not commercial and industrial property under the Act and therefore their value did not have to be calculated into the assessed value of all other commercial and industrial property. The *Clinchfield* court stated that a partial exemption of 40 percent of the value of stored tobacco inventories violated the 4-R Act. However, the Fourth Circuit court also added that "[t]he 4-R Act does not require a state to tax all business personal property; the state is free to grant any exemptions." *Clinchfield,* 784 F.2d at 553.

The cases from California, Arizona and Louisiana adopt an analysis of the 4-R Act that differs markedly from that espoused by the Eighth Circuit. The Eighth Circuit established in *Trailer Train v. State Board of Equalization,* 710 F.2d 783 (8th Cir. 1983) that the "result" language of section 306(1) (d) is key to the interpretation of that section. I believe that the stipulations of the parties establish that the result of Nebraska's taxation system is that the majority of personal property in the state is exempt while Trailer Train pays taxes on all of its personal property in the state. Therefore, the result appears to be discriminatory under section 306(1) (d).

The parties have stipulated that only 24.25 percent of all the tangible personal property in Nebraska is subject to personal property tax, and that Trailer Train's property falls into this minority. Simply because the group of property with which Trailer Train seeks to tie its tax fate is commercial and industrial property, there is no reason to adhere to the restrictions imposed by the definition in

section 306(3) (c). The definitional provision was meant to be applied in disputes about the proper valuations for assessment purposes and should not be permitted to thwart the effectiveness of section 306(1) (d), which was intended to be a catch-all provision.

Specifically, I reject the defendant's argument that the definition of commercial and industrial property in section 306(3)(c) precludes a determination of discrimination under section 306(1) (d). The Eighth Circuit in *Ogilvie* made it plain that section 306(1) (d) should be given a broad interpretation to prevent discrimination in "any form whatsoever." The *Bair* decisions concluded that section 306(1) (d) is available in situations where a remedy is unavailable under section 306(1) (a) and that classification discrimination should be remedied through section 306(1)(d). Additionally, I have decided to adopt the Eleventh Circuit's decision to consider exemptions from taxes in determining whether railroads have been subject to discrimination in violation of section 306(1) (d).

Although the exemptions from tangible personal property taxation in Nebraska's scheme appear to result in discrimination, I must determine whether the actual result is an unfair and discriminatory tax burden on the railroads. Having determined that Trailer Train, as a rail car line, is .entitled to the protection of section 306(1) (d), that the protections afforded to railroads and car lines under section 306(1) (d) are distinct from those provided by section 306(1) (a), and that the definition of commercial and industrial property found in section 306(3) (c) concerns challenges to tax assessment ratios under section 306(a)(1) and has no significance to a claim based on classification discrimination under 306(1) (d), I must find

that Trailer Train is entitled to the protection from unfair classifications that result in discriminatory tax treatment under section 306(1) (d). I conclude that Nebraska's system discriminates against Trailer Train in violation of section 306(1) (d) of the 4-R Act based on the fact that 75.75 percent of the personal property in the state is exempt and none of Trailer Train's personal property is exempt.

A comparison of the effect of the tax and exemptions on the plaintiffs with the effect on all owners of commercial and industrial property in Nebraska reveals that the plaintiffs are taxed on all their commercial and industrial personal property at the rate of 86.81 percent of its actual value, whereas 75.75 percent of the commercial and industrial personal property in Nebraska is except from taxation. Others who own commercial and industrial personal property are obviously taxed substantially less on the same category of property. The tax is discriminatory.

Although the defendants seem to argue that the wording of Nebraska's personal property tax statutes is reasonably based on the type of property rather than the owner of the property, the conclusion that therefore there is no discrimination must be rejected. Taxing only property of a type owned only or almost entirely by railroads would not free the state from a charge of discrimination under section 306(1) (d) on the theory that as long as the statute described only property and not owners or operators there would be no discrimination against railroads. It is the effect on owners and operators as determined by the effect on property that makes the discrimination.

The tax commissioner argues vigorously that § 306(1)(d) was not created to give the plaintiffs a preferential tax treatment, which would be the result if the plaintiffs were given an injunction freeing them of the Nebraska tax. I agree that § 306(1) (d) is not for the purpose of giving anyone a preferential tax treatment, but I agree with the analysis in that respect of *Kansas City Southern Railway Co. v. McNamara*, 817 F.2d 368 (5th- Cir. 1987), in observing that courts are ill-equipped for the job of determining the specific tax level at which a particular taxpayer should be taxed. The *Kansas City Southern* case was more complex than this one, but I think the proper solution is, as in that case, to declare that the Nebraska tax violates the requirements of § 306(1) (d) and a collection of the tax from the plaintiffs must be unconditionally enjoined. I have confidence, as the court in *Kansas City Southern* had, in the ability of the state legislature and tax commissioner to "create tax structures that comply with the 4-R Act while ensuring that the railroads pay their fair share of state taxes." *Id.* at 378.

Dated December 11, 1987.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

TRAILER TRAIN COMPANY, RAILBOX COMPANY, AND RAILGON COMPANY, Plaintiffs, vs. DONALD S. LEUENBERGER, TAX COMMISSIONER OF THE STATE OF NEBRASKA, Defendant.	CV87-L-29 JUDGMENT (Filed Dec. 11, 1989)

For the reasons stated in the accompanying memorandum of decision,

IT IS ORDERED that the assessment of the plaintiffs' personal property and the imposition, levy or collection of any personal property taxes against the plaintiff pursuant to the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54, now codified as 49 U.S.C. § 11503, and the imposition, levy, and collection of such taxes from the plaintiffs are permanently enjoined.

Dated December 11, 1987.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

ENTERED ON THE DOCKET
DEC 11 1987
WILLIAM L. OLSON, Clerk

BY/s/ C. Rertz
Dep. Clerk